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Reasons for decision

Mr. Jack Andree,

complainant,

and

Teamsters Local Union No. 419,

respondent.

Board File: 28344-C

Neutral Citation: 2011 CIRB 589

May 13, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David P. Olsen, Members.

Counsel of Record

Mr. Jack Andree, representing himself;

Ms. Marisa Pollock, for Teamsters Local Union No. 319;

Ms. Kristin R. Taylor, for Clean Harbors Canada Inc.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Application

[1] Section 16.1 of the *Canada Labour Code (Part I – Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to decide this adjournment request without an oral hearing.

[2] This is a rare case where the Board is obliged to determine the merits of an adjournment request and fix the date of its oral hearing.

[3] In the Board's experience, if an adjournment is requested for the initial hearing date set by the Registrar, parties are usually able to agree on a list of alternate hearing dates for the Board's consideration.

[4] In this case, the complainant, Mr. Jack Andree (Mr. Andree), is available at virtually any time and is concerned about the delay in hearing his duty of fair representation (DFR) complaint. The Teamsters Local Union No. 419 (Teamsters) have requested an adjournment of the hearing dates the Board initially set for June 27-28, 2011. The Teamsters provided, with one exception, a few individual non-consecutive dates when they are available for an oral hearing.

[5] Despite the Board's efforts, including that of its Industrial Relations Officer (IRO), the parties could not provide a mutual list of dates. Accordingly, the Board must determine whether to grant the adjournment and, if necessary, when it will hear this DFR complaint, taking into account the parties' positions, the Board's availability and the public interest in dealing with labour relations cases in an efficient manner.

[6] The Board has decided to grant the Teamsters' request for an adjournment of the June 27-28, 2011 hearing dates. The Board has also decided to hear this case on the following dates: November 23-24, 2011. A Case Management Conference (CMC) will take place on November 4, 2011.

II—Facts

[7] On August 25, 2010, the Board received a DFR complaint from Mr. Andree. In that complaint, Mr. Andree described an October 28, 2008 layoff notice he had received from his employer, Clean Harbours Canada Inc. (CHC), and his subsequent representation by the Teamsters.

[8] On November 2, 2010, the Board, following the *prima facie* case analysis it conducts for DFR complaints (see, for example, *James Scot Crispo*, 2010 CIRB 527), requested submissions in response to Mr. Andree's DFR complaint.

[9] On November 17, 2010, the Board received the Teamsters' response which summarized the steps it had taken to assist Mr. Andree, including taking a grievance to arbitration before arbitrator Louisa Davie.

[10] CHC, by letter dated November 18, 2010, advised it did not intend to file a response.

[11] Mr. Andree filed his reply on November 24, 2010.

[12] By letter dated January 11, 2011, the Board set the matter down for an oral hearing on June 27- 28, 2011 in Toronto and also scheduled a CMC.

[13] CHC, by letter dated January 19, 2011, advised it did not intend to participate in the CMC or the oral hearing.

[14] On February 8, 2011, the Teamsters wrote the Board advising they were not available on June 27-28, but had agreed with Mr. Andree to have the case heard on June 2-3, 2011.

[15] On February 15, 2011, the Board advised the parties that it was not able to hear the matter on June 2-3, 2011. The Board referred the parties to its Information Circular No. 4 which explains its

adjournment process. As part of that process, the parties must mutually agree to adjourn and also provide the Board with a list of possible alternative dates.

[16] On February 28, 2011, the Board received a note from Mr. Andree advising he was free in July, other than July 15-17. On March 1, 2011, the Teamsters wrote and advised that they were available on certain non-consecutive dates: September 6 and 16, October 3, and November 3, 11, 23 and 30.

[17] On March 3, 2011, the Board wrote to the parties:

The Board has scheduled this matter for hearing on June 27 - 28, 2011, as set out in its hearing notice of January 11, 2011.

On February 8, 2011, the Board received a letter from the Teamsters Local Union No. 419 inquiring whether the matter could be heard on June 2 - 3, 2011. Both the Teamsters and Mr. Andree were available for those earlier dates. The Board, however, could not accommodate those dates.

In its letter dated February 15, 2011, the Board referred the parties to its policy on adjournments and asked for them to agree on a series of mutual available dates up to and including November 2011. Based on Mr. Andree's letter of February 23, 2011, and that of the Teamsters dated March 1, 2011, the parties appear not to have consulted each other, or have been unable to agree to on a series of possible alternate dates.

The hearing will therefore proceed on June [27 - 28], 2011, as originally scheduled.

If either party wants to file submissions requesting an adjournment, and the reasons therefore, the Board will consider the request. However, adjournments are not automatic and, in the absence of sufficient justification, the hearing will proceed on the dates as originally set by the Board.

[18] On March 30, 2011, the Teamsters filed their submissions supporting their request for an adjournment of the June 27-28, 2011 hearing dates. The Teamsters explained that their key advisor and witness, Mr. Brian Lawrence, had to attend the convention of the International Brotherhood of Teamsters in the United States from June 27 to July 1, 2011. This commitment had already been made prior to the Board scheduling its June 27-28, 2011 hearing.

[19] The Teamsters requested the Board to reschedule the hearing for the dates they submitted. The Teamsters noted that they had consulted with Mr. Andree initially and they had mutually suggested an earlier alternative hearing date of June 2-3, 2011, a date when the Board was not available.

[20] The Teamsters also noted that their request was made several months before the scheduled June, 2011 hearing; it was not a last-minute motion for an adjournment.

[21] On April 4, 2011, the Teamsters, on its own initiative, filed a supplementary submission asking the Board to dismiss Mr. Andree's DFR complaint on the basis that it did not raise a *prima facie* case.

[22] Since the parties could not agree on dates, the Board asked the IRO assigned to the file to work with the parties in the hope that a list of hearing dates could be obtained that would suit the parties' schedules, that of the Board, as well as the need to have this case heard in an efficient and practical manner.

[23] The IRO confirmed the results of his efforts in his April 11, 2011 letter to the parties:

Further to the request of the panel assigned to this matter, I contacted both Ms. Pollock for the Teamsters Local Union 938 as well as Ms. Andree, representative for the complainant, during the week of April 4, 2011 in an to [sic] attempt to resolve the recent request to the Board by the Teamsters to adjourn the hearing dates scheduled for June 27 and 28, 2011.

Ms. Pollock advised me verbally that she cannot provide alternative **consecutive** dates (due to unavailability until March 2012) but would provide alternative single days after reviewing her calendar with her assistant. On April 6, 2011, I received an email from Ms. Valentine (Ms. Pollock's assistant) containing the following additional single days that Ms. Pollock would be available to reschedule the hearing: April 13th and 21st, May 2nd, 5th and 18th and June 14th, 2011.

This information was subsequently relayed by myself to Ms. Andree in a telephone conversation wherein she reiterated her wish to commence the hearings on behalf of her husband, Mr. Jack Andree, as soon as possible as the issue has been ongoing for more than two (2) years. The applicant continues to be available for the hearing dates already scheduled in June 2011 as well as any other dates that it may be necessary for the Board to hear the matter.

The file is being returned to the panel who will now decide i) the request to adjourn, and, ii) the dates it will hold its hearing, given that the parties were unable to agree and submit possible sets of hearing dates. The Board will also examine the Teamsters' recent supplemental pleading.

(emphasis in original)

III—Issues

[24] The facts as set out above raise two issues:

- a) Should the Board grant the Teamsters' adjournment request?;
- b) On what dates will the Board hold its hearing?

IV—Analysis and Decision

[25] The Board has the explicit authority under section 16(1) of the *Code* and section 29(1) of the *Canada Industrial Relations Board Regulations, 2001* to adjourn its proceedings on grounds that it deems appropriate:

16 The Board has, in relation to any proceeding before it, power

...

(1) to adjourn or postpone the proceeding from time to time.

...

29.(1) The Board may cancel, adjourn or postpone a hearing.

[26] The Board has created and posted on its website Information Circular No. 4 to inform parties about its adjournment process:

REQUEST FOR ADJOURNMENT OR POSTPONEMENT

The logistical difficulties caused by the Board's heavy caseload and its geographically widespread and bilingual community render it very difficult to reschedule dates in an orderly and timely fashion. The Board is therefore very reluctant to accede to requests for postponement of its proceedings. In *Stephen Frayling*, 2010 CIRB 506, the Board discusses its policy regarding requests for postponement.

The Board will not consider a request for postponement unless the party making the request has communicated beforehand with the other parties and attempted to obtain their consent to the postponement. All requests for postponement must be made in writing to the Board, with copies to the other parties at the same time, and must include the reasons for the request for postponement, the positions of the other parties to the request, and a list of alternative dates to which all parties agree and from which the Board may choose, to the extent that this may be possible. Parties should realize, however, that in those instances where a postponement is granted, they may have to wait several months before the Board can reschedule a hearing.

Upon receipt of the request for postponement, the Board will take the parties' positions under consideration. Consideration of a request for postponement does not mean that postponement will automatically be granted, even where all parties give their consent. The decision to grant a postponement rests with the panel that has been scheduled to hear the case after considering the merits of such request. Parties who do not consent to the postponement should make their views known to the Board, as soon as the party seeking the postponement has contacted them.

There may be situations of last minute urgency where it is impossible for the parties to consult one another. In such cases, the Board will only grant the request for postponement in very exceptional cases. Also, in some instances, because of circumstances beyond its control or for reasons totally unrelated to the parties, the Board may unilaterally determine that a postponement is necessary.

Requests for adjournment *sine die* follow a similar process, although parties are not required to identify alternative dates. The parties will be asked to provide regular updates to the Board and to keep it informed of developments that may impact the status of the matter before the Board.

[27] Adjournments are not automatic. The Board is under a statutory duty to decide cases which come before it. In order to fulfill its role under the *Code*, it must consider various competing interests, including those of the parties, the Board and the public.

[28] Unlike a private rights arbitrator, who is retained by the parties, the Board is a creature of statute and has a role *proprio motu* to ensure that matters which come before it are conducted with appropriate diligence. For this reason, much like the civil courts, the Board now case manages its proceedings. This case management process may include imposing hearing dates.

[29] The Ontario Labour Relations Board (OLRB) in *Industrial Hardwood Products (1996) Ltd.*, [1999] O.L.R.D. No. 2842, follows a similar adjournment process for many of the same reasons:

9. The Board's policy on adjournments exists for a number of reasons. The Board schedules thousands of cases for hearing every year. In the past few years, the Board's budget, and hence personnel, has been significantly cut. It is simply beyond the Board's resources to either consult with counsel as to their availability in each and every instance or reschedule hearing dates a number of times. In addition, labour relations matters, involving ongoing relationships between the parties and affecting the daily working lives of employees, require expeditious treatment. If the Board were to delay the scheduling of cases until such time as it was convenient for all concerned, expedition would be impossible.

10. The policy is, however, only a general one and consideration is given to individual requests for adjournments.

[30] In *Stephen Frayling*, 2010 CIRB 506, the Board described its adjournment practice which seeks to balance the interests of parties with the need to deal with cases efficiently:

[20] The Board's practice on adjournments is comparable to that followed by other Canadian labour relations boards. A party's first step is **not** to write directly to the Board requesting an adjournment.

[21] The Board's Information Circular No. 4-01, available publicly on the Board's website, clearly explains the Board's policy.

[22] If a party requires an adjournment, then its first step is to communicate with the other parties. Other than in exceptional circumstances, the Board will often adjourn a matter at the joint written request of the parties.

[23] However, if the matter is contested, then the Board will decide whether to adjourn, based on the parties' written submissions or after a CMC, depending on the situation. The Board also has a public interest role to exercise when considering such a request: *Société Radio-Canada*, 2002 CIRB 193.

(emphasis in original)

[31] In *Société Radio-Canada*, 2002 CIRB 193, the Board commented, in the context of a request for a stay of proceedings, about the public interest for matters which come before it:

[30] The Board wishes to emphasize that an application filed under the *Code* is a procedure that follows from public legislation, in contrast to the arbitration of grievances, which is a private process and controlled by the parties. According to its statutory mandate, the Board must consider all the objectives of the legislation that governs it and not only the interests of one of the parties. The *Code* sets out the following objectives in its Preamble:

Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

And whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

And whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all; ...

(emphasis added)

...

[33] The Board's role is at the very heart of this public interest policy, and therefore plays its role with respect to all the parties to a dispute and not only with respect to the interests of the person who institutes an application involving his or her rights. Thus an application before the Board does not belong to the party who files it, but affects the interests of all the other parties involved. For this reason, the withdrawal of a proceeding cannot be done unilaterally by the party requesting it, but must be formally granted by the Board after considering the consequences of the withdrawal on the labour relations of those concerned in view of the *Code's* objectives.

[34] As well as taking into account the public interest policy described above, the Board's role in any application must also be evaluated according to three realities. Firstly, time is often of the essence in the labour-management relationship. Secondly, the parties are in a continuous relationship, which means that they must continue to coexist once their dispute is resolved. Thirdly, the Board must consider the objectives of the legislation, as described above.

(emphasis in original)

[32] The Board is required to sit across a country the size of Canada. Each Board panel must have a neutral Chair, of which there are only six. Some cases further require the specific panel to be bilingual in order to respect the *Official Languages Act*. The *Code* also presumes matters will be heard with a three-person representative panel, subject to the Chair's discretion at section 14 of the *Code* to appoint a single-person panel.

[33] These operational realities cannot be ignored when faced with an adjournment request and a respondent's very limited availability to appear at a rescheduled Board hearing.

A--Should the Board grant the Teamsters' adjournment request?

[34] The Board understands that parties and their experienced counsel have far more matters than just those before the Board. Their schedule is a factor for the Board to consider, especially when requesting an adjournment for a hearing the Board scheduled unilaterally. Indeed, Information Circular No. 4 encourages the parties to work together to propose a list of alternative dates. The Board regularly tries to accommodate those requests and may change the initial composition of a panel to meet one of the suggested alternatives.

[35] In the instant case, Mr. Andree did not explicitly contest the Teamsters' request to adjourn the June, 2011 dates. Rather, his concern is that his situation has been ongoing since his 2008 layoff and he wants to have his complaint heard.

[36] The Teamsters immediately alerted the Board to their difficulty in attending the Board's June, 2011 hearing and attempted to propose another date.

[37] Based on these facts, and the unavailability of Mr. Lawrence, the Board grants the Teamsters' request and adjourns the June 27-28, 2011 hearing.

B—On what dates will the Board hold its hearing?

[38] The Board has competing positions before it about when it should hold Mr. Andree's hearing.

[39] Mr. Andree has stated he is available at almost any time to have his case heard, except for three specific days in July.

[40] The Teamsters, on the other hand, have not been able to provide any consecutive days, other than the June 2-3, 2011 days mentioned above, for the hearing of this matter. In March and April, 2011, they provided a few further individual dates as a result of the IRO's efforts, but advised they have no consecutive days for an oral hearing until March, 2012.

[41] The Teamsters' schedule is a factor the Board has considered. To accommodate that schedule the Board would be obliged to hear Mr. Andree's case in a piecemeal fashion on two or three non-contiguous days. The Teamsters' unavailability would also oblige the Board's three-person panel to travel on those separate occasions in order to accommodate them.

[42] The Board, in taking all of the competing interests into account, has decided to schedule a two-day hearing into Mr. Andree's complaint. Those days will be consecutive.

[43] The Board will use one of the Teamsters' proposed dates, November 23, 2011, but is giving notice that the hearing will continue the following day on November 24, 2011. It will be up to the parties to make the necessary arrangements to defend their interests at that hearing.

[44] Given that the Board originally determined that Mr. Andree had met the *prima facie* case threshold, the Board will not be issuing any decision about the Teamsters' unsolicited April 4, 2011 supplemental pleading.

[45] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member